No. 87-1151

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

LEDERLE LABORATORIES, a division of American Cyanamid Co.,
Petitioner,

v.

DAVID TONER, *et al.*,
Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals for the Ninth Circuit

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PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. The Decision Below Conflicts With Other Appellate Decisions On an Important Issue of Federal Procedural Law	2
II. The Importance of the Underlying Public Policy Concerns Raised by This Case Is Supported by This Court's Grant of Certiorari in Berkovitz v. United States	6
CONCLUSION	8

TABLE OF AUTHORITIES

Cases	Page
Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355 (1962)	3
Berkovitz v. United States, No. 87-498, 56 U.S. L.W. 3459 (U.S. Jan. 11, 1988)	1, 7
Cassisi v. Maytag Co., 396 So.2d 1140 (Fla. Dist. Ct. App. 1981)	4, 5
Colgrove v. Battin, 413 U.S. 149 (1973)	3
Curtis v. Loether, 415 U.S. 189 (1974)	3
Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938)	3
Fish Breeders of Idaho, Inc. v. Rangen, Inc., 108 Idaho 379, 700 P.2d 1 (1985)	5
Gallick v. Baltimore & Ohio Railroad Co., 372 U.S. 108 (1963)	3
Gulf Refining Co. v. Fetschan, 130 F.2d 129 (6th Cir. 1942), *cert. denied*, 318 U.S. 764 (1943)	2
Hanna v. Plumer, 380 U.S. 460 (1965)	3
Iacaponi v. New Amsterdam Casualty Co., 258 F. Supp. 880 (W.D. Pa. 1966), *aff'd*, 379 F.2d 311 (3d Cir. 1967), *cert. denied*, 389 U.S. 1054 (1968)	3
Jenkins v. Whittaker Corp., 785 F.2d 720 (9th Cir.), *cert. denied*, 107 S. Ct. 324 (1986)	2
McIntyre v. Everest & Jennings, Inc., 575 F.2d 155 (8th Cir. 1977), *cert. denied*, 439 U.S. 864 (1978)	5, 6
Rojas v. Lindsay Manufacturing Co., 108 Idaho 590, 701 P.2d 210 (1985)	4
Shields v. Morton Chemical Co., 95 Idaho 674, 518 P.2d 857 (1974)	4
Toner v. Lederle Laboratories, 828 F.2d 510 (9th Cir. 1987)	5
Toner v. Lederle Laboratories, 779 F.2d 1429 (9th Cir. 1986), *amended by* 831 F.2d 180 (1987)	2
Wartman v. Branch 7, Civil Division, County Court, 510 F.2d 130 (7th Cir. 1975)	3
West v. Caterpillar Tractor Co., 336 So.2d 80 (Fla. 1976)	4
Witt v. Norfe, Inc., 725 F.2d 1277 (11th Cir. 1984)	4, 5

TABLE OF AUTHORITIES—Continued

Constitutional Provisions Page

U.S. Const. amend. VII 3

Statutes, Rules and Restatements

Fed. R. Civ. P. 49 3
Fla. Stat. Ann. § 672.314(2)(c) (West 1966 & Supp. 1987) 5
Restatement (Second) of Torts § 402A (1965) 4

Treatises and Periodicals

9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2502 (1971) 2
L. Tribe, *American Constitutional Law* (2d ed. 1988) 3
Shulman, *The Demise of Swift v. Tyson*, 47 Yale L. J. 1336 (1938) 3

Briefs

Abbott v. American Cyanamid Co., No. 87-1578, Brief for the United States as Amicus Curiae (4th Cir. Aug. 1987) 6
Berkovitz v. United States, No. 87-498, Brief of the United States (U.S. Dec. 1987) 7

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PETITIONER'S REPLY BRIEF

ARGUMENT [1]

Respondents' opposition to the Petition for Certiorari rests on one fundamental contention: that there is no federal-law conflict among the circuits for this Court to resolve since the decision below and the cases from other circuits cited in the Petition involved conflicts of state substantive law rather than federal procedural law. As we show in this reply, respondents are wrong on this point. In addition, we submit that this Court's grant of certiorari in *Berkovitz v. United States*, No. 87-498, 56 U.S.L.W. 3459 (U.S. Jan. 11, 1988) supports a grant of certiorari here, so that the threats posed by both decisions

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[1] Pursuant to Supreme Court Rule 28.1, Lederle refers the Court to its Petition at ii for the required listing of parent companies, subsidiaries and affiliates.

to the nation's public health vaccination policies can be considered at the same time.

I. The Decision Below Conflicts With Other Appellate Decision On an Important Issue of Federal Procedural Law

Contrary to respondents' contentions, the inconsistency of a federal jury's special verdicts in a diversity case is plainly a matter of federal procedural law, not state substantive law. The Ninth Circuit itself recognized that fact. *Toner v. Lederle Laboratories*, 779 F.2d 1429, 1434 (9th Cir. 1986), *amended by* 831 F.2d 180 (1987), Petition Appendix 19a. Other federal courts have uniformly agreed.[2] As a leading authority on federal procedure states:

> The courts have uniformly reached the result predicted by the Advisory Committee and have refused to regard state law as controlling on the submission of special verdicts and interrogatories. State law does not govern whether to use a general verdict or a special verdict, or what questions to submit if these procedures are used, or the form of the questions submitted, or how the jury is to be instructed, or the effect of inconsistency between a general verdict and a special interrogatory, or any other detail of the special verdict and interrogatory practice.

9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2502, at 487 (1971) (footnotes omitted). While state law may supply the substantive legal principles for the jury to apply in reaching the verdicts whose consistency is in question, the federal courts are empowered, as a matter of federal procedural law, to decide whether particular verdicts can be reconciled.

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[2] *See, e.g., Jenkins v. Whittaker Corp.*, 785 F.2d 720, 735 (9th Cir., *cert. denied*, 107 S.Ct. 324 (1986) (whether jury verdict consistent in diversity action question of law reviewable *de novo*); *Gulf Refining Co. v. Fetschan*, 130 F.2d 129, 134-35 (6th Cir. 1942), *cert. denied*, 318 U.S. 764 (1943) (inconsistent verdicts in diversity action involve federal procedural issue).

This rule necessarily follows from this Court's own prior decisions. If a federal court is obliged "to harmonize the [jury's] answers, if it is possible under a fair reading of them," *Gallick v. Baltimore & Ohio Railroad Co.*, 372 U.S. 108, 119 (1963), it obviously must have the authority to look at the applicable state substantive law and determine for itself whether, when a federal court jury has been properly instructed as to that law, the court can reconcile an alleged conflict in the jury's special verdicts.[3] Thus, in *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364 (1962), a diversity case, the Court referred to Seventh Amendment "common law" principles to reconcile the jury's findings, but never referred to the common law of any particular state, as it surely would have had to do if state law were determinative of the reconciliation issue.[4] Clearly, under *Stevedores*, the Ninth Circuit's decision below presents a federal law issue.

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[3] This case concerns the authority to employ special verdicts granted by Fed. R. Civ. P. 49, so that there is a strong presumption in favor of applying federal law. *See Hanna v. Plumer*, 380 U.S. 460 (1965). Nothing in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) suggests otherwise. *See also* Shulman, *The Demise of Swift v. Tyson*, 47 Yale L.J. 1336, 1351 (1938): "[F]ederal power over procedure in the federal courts is left undisturbed by the *Tompkins* case."

[4] The Seventh Amendment's clause precluding reexamination of facts tried by a jury except "according to the rules of the common law," relied upon in *Atlantic & Gulf Stevedores*, is limited by its terms to the "Court[s] of the United States." U.S. Const. amend. VII. This Court has never held that the Seventh Amendment applies through the Fourteenth Amendment to the states. *See Curtis v. Loether*, 415 U.S. 189, 192 n.6 (1974); *Colgrove v. Battin*, 413 U.S. 149, 169 n.4 (1973) (Marshall, J., dissenting). *See also, Wartman v. Branch 7, Civil Division, County Court*, 510 F.2d 130, 134 (7th Cir. 1975); *Iacaponi v. New Amsterdam Casualty Co.*, 258 F. Supp. 880, 884 (W.D. Pa. 1966), *aff'd*, 379 F.2d 311 (3d Cir. 1967), *cert. denied*, 389 U.S. 1054 (1968); L. Tribe, *American Constitutional Law* 773 (2d ed. 1988). Plainly, the Seventh Amendment will at times compel federal courts to reconcile verdicts in a different manner than state courts might have done.

The conflict among the circuits on federal procedural law cited in the Petition is a real one. It cannot be avoided on the basis of alleged differences between the substantive bodies of state law involved. In *Witt v. Norfe, Inc.*, 725 F.2d 1277 (11th Cir. 1984), the Eleventh Circuit held that a jury's special verdicts exonerating a manufacturer on strict liabiity and implied warranty claims for product design defects were inconsistent with another special verdict of the same jury that the manufacturer was negligent in designing its product. Here, the Ninth Circuit found that special verdicts virtually identical to those in *Witt* were consistent. Although *Witt* involved principles of Florida substantive law and this case involves Idaho law, those principles are essentially the same in both states, not different as respondents contend.

Florida and Idaho both base strict liability on Restatement (Second) of Torts § 402A (1965), *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 87 (Fla. 1976); *Shields v. Morton Chemical Co.*, 95 Idaho 674, 676-77, 518 P.2d 857, 859-60 (1974), but respondents argue that Florida, unlike Idaho, does not apply the full Restatement § 402A strict liability test that a product be in a "defective condition unreasonably dangerous," instead requiring only a showing of a defective condition. Respondents conclude that Florida's omission of the "unreasonably dangerous" element distinguishes its law from Idaho's.

This argument rests on a misreading of *Witt* and the Florida intermediate appellate decision, *Cassisi v. Maytag Co.*, 396 So. 2d 1140 (Fla. Dist. Ct. App. 1981), upon which *Witt* relies. In Idaho, whether a product is unreasonably dangerous turns on the expectation of the "ordinary user or consumer for whose use the product is intended," *Rojas v. Lindsay Manufacturing Co.*, 108 Idaho 590, 592, 701 P.2d 210, 212 (1985). The Ninth Circuit here relied upon the consumer expectation stand-

ard when it constructed the theory that allowed it to reconcile the special verdicts. *Toner v. Lederle Laboratories*, 828 F.2d 510, 513 (9th Cir. 1987), Petition Appendix 6a. In *Cassisi*, from which *Witt* derived the controlling Florida law, the Florida court applied the same consumer expectation standard as part of the showing of defective condition. It stressed that: "the standard for all product defects under Section 402A is the same: Were the ordinary consumer's expectations frustrated by the product's failure to perform under the circumstances in which it failed?" 396 So.2d at 1144-45 (footnote omitted).

Respondents' effort to distinguish *Witt* must therefore fail. The crucial element upon which the Ninth Circuit here relied to reconcile the special verdicts was also present in *Witt*, where the Eleventh Circuit reached the opposite result under federal procedural law. 725 F.2d at 1280.[5] *Witt* and *Toner* are indistinguishable and present a conflict of federal law for this Court's resolution.[6]

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[5] Respondents' effort to distinguish the courts' treatment of the implied warranty special verdicts in *Witt* and *Toner* is equally unsound. Both Florida and Idaho follow the Uniform Commercial Code merchantability principle that goods must be "fit for the ordinary purposes for which such goods are used," Fla. Stat. Ann. § 672.314(2)(c) (West 1966 & Supp. 1987); *Toner*, 828 F.2d at 514, Petition Appendix 8a, and respondents point to no significant difference between the jury instructions given in the two cases. *See Witt*, 725 F.2d at 1280; *Toner*, 828 F.2d at 514, Petition Appendix 8a. The sole Idaho decision which respondents cite, *Fish Breeders of Idaho, Inc. v. Rangen, Inc.*, 108 Idaho 379, 386, 700 P.2d 1, 8 (1985), does not hold that special verdicts on negligence and implied warranty can *never* be inconsistent, but only that they are not necessarily inconsistent where they reach differing results on issues of damage and causation. *Fish Breeders* has no bearing on the inconsistency of negligence and implied warranty verdicts based upon the same allegations of defective design.

[6] Respondents offer no basis for distinguishing the second decision which Lederle has identified as conflicting with the Ninth Circuit's ruling below, *McIntyre v. Everest & Jennings, Inc.*, 575

II. The Importance of the Underlying Public Policy Concerns Raised by This Case Is Supported by This Court's Grant of Certiorari in Berkovitz v. United States

While the narrow federal issue presented here involves the inconsistency of special jury verdicts, far broader concerns of national health policy are also implicated. Under federal health programs authorized by Congress, federal officials encourage and finance the widest possible use of numerous vaccines, including those which lay juries are now being invited to brand as negligently designed.[7] Whether the Ninth Circuit improperly reconciled inconsistent special verdicts in this case represents but one facet of a broader question: how strictly should courts scrutinize the inconsistency of special verdicts of lay juries that threaten to curtail the supply of essential vaccines that the federal government has not only determined to be safe and effective, but also finances and promotes for the widest possible use?

F.2d 155 (8th Cir. 1977), *cert. denied*, 439 U.S. 864 (1978). Instead, respondents argue only that the *McIntyre* court's conclusions regarding the inconsistency of the negligence and strict liability verdicts before it amounted to *dicta*. This is plainly wrong because, as previously explained, Petition at 18 n.30, the Eighth Circuit's determination that "[t]he jury's finding in favor of the defendant on the issue of strict liability precludes a finding of negligent design," 575 F.2d at 159, was a necessary predicate to its reversal of the jury's verdict on the alternative ground of failure to warn due to insufficiency of the evidence. The warning issue could only have arisen if the negligent design issue had already been resolved in defendant's favor on the basis of the inconsistency in the special verdicts.

[7] Moreover, the negligent design verdicts rest on the theory that the manufacturers should have perfected a different type of vaccine which the responsible public health authorities do not now regard as safe and effective and are not prepared to license for general public use. *See Abbott v. American Cyanamid Co.*, No. 87-1578, Brief for the United States as Amicus Curiae (4th Cir. Aug. 1987), Petition Appendix 90a-95a.

On January 11, 1988, this Court granted certiorari in *Berkovitz v. United States*, No. 87-498, 56 U.S.L.W. 3459, a case posing many similar policy concerns about the federal government's own tort liability for alleged negligence in approving and promoting the distribution and use of vaccines. As the Brief of the United States supporting the grant of certiorari makes clear, the potential policy consequences of *Berkovitz* are very broad:

> [S]uch tort suits against the government pose a serious threat to the continued availability of this life-saving [Sabin polio] vaccine. If a court were to conclude that the government was indeed negligent because it failed to follow its own regulations in licensing the vaccine in 1963, thereby rendering the government liable for all damages resulting from it, the government—if it did not want to become a complete insurer of the vaccine—might have to order its withdrawal pending a new licensing proceeding.

Berkovitz v. United States, No. 87-498, Brief for the United States at 8 (U.S. Dec. 1987).

Similar policy considerations apply here. Inconsistent jury verdicts that, in effect, treat manufacturers of federally approved and promoted vaccines as insurers of their products also threaten the public with the loss of these essential products. Many manufacturers have ceased making childhood vaccines precisely because of the threat of massive tort judgments. Petition at 8-9. It is no more appropriate to treat the manufacturer of a nondefective vaccine as an insurer of a federally approved and promoted product than to treat the government as an insurer because it licenses the product and approves or promotes its use. The Court should exercise this opportunity to consider the procedures by which manufacturers of federally approved vaccines may be found liable by federal juries for alleged negligent design at the same time as it reviews the scope of the government's own tort liability in *Berkovitz*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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